Supreme Court of the United States

OCTOBER TERM, 1943

No. 180

TRANSBAY CONSTRUCTION COMPANY, *Petitioner,*

v.

CITY AND COUNTY OF SAN FRANCISCO, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Transbay Construction Company, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered March 19, 1943, rehearing denied June 1, 1943.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 3048-60) is reported in 134 F. (2) 468. The opinion of the District Court of the United States for the Northern District of California, Southern Division (R. 73-83), is reported in 35 F. Supp. 433.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 19, 1943 (R. 3062). A petition for rehearing was denied June 1, 1943 (R. 3062). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. Code Sec. 347).

QUESTION PRESENTED

Where the performance of a public works contract has been delayed by the contracting governmental agency and the cost of performing the contract has been radically and unreasonably increased, may the contract be deemed abrogated and the contractor permitted to recover the reasonable value of the work on a *quantum meruit*?

STATEMENT

On April 8, 1935, the petitioner, Transbay Construction Company, and the respondent, City and County of San Francisco, entered into a contract for the enlargement of O'Shaughnessy Dam at Hetch Hetchy, California, according to plans and specifications prepared by the respondent (Ct. Ex. 1, R. 270). The contract is of the comprehensive, municipal variety; it contains all the usual terms and provisions for the protection of the city, including the customary provision that the contractor shall not be entitled to damages for delays, whether avoidable or unavoidable (R. 270-318). The time for completion of the work was fixed at two years or 730 days (R. 302), and a penalty of $400 provided for each additional day required to complete the work (R. 306).

The petitioner planned to complete the work in about 22 months, or two months less than the time specified in the contract (R. 400). The respondent was fully

advised of petitioner's plan of work (R. 472, 2225-26, 2242).

At the time of the construction of the original dam the foundation for the addition had been laid in the bottom of the canyon, so that the petitioner was only required to excavate material from the side walls of the canyon. Petitioner planned to shoot down the proposed excavation from the north canyon wall during the period it was building its concrete plant and installing a twenty-ton cableway or high line across the canyon over the dam site. When the high line and the concrete plant were completed about November 1, 1935, the high line could be used for the removal of rock shot down from the canyon wall and for the placing of concrete at the bottom (on the north half of the dam) to a height of approximately 60 feet before the high water in the reservoir would compel the respondent to release surplus water from the lower set of outlet valves (R. 414, 2320, 2321). The spillway of the original dam discharged water only through the north section, so that during the high water period excavation work could be carried on at the south side of the canyon (R. 580). Thereafter the petitioner planned to place the concrete alternately on the north side and the south side of the canyon walls (R. 2321). The specifications indicated that the total amount of rock to be excavated was 30,000 yards which would be evenly divided between the north and south canyon walls. If no more than this amount had been removed, the petitioner would have had no difficulty in proceeding with the pouring of concrete on November 1, 1935, according to schedule (R. 2321-22). Respondent's conduct made adherence to schedule impossible.

Although Hetch Hetchy is within the boundaries of Yosemite National Park (R. 442), over which the Fed-

eral Government exercises exclusive jurisdiction, except for purposes not here material (*Collins* v. *Yosemite Park & C. Co.,* 304 U. S. 518), respondent permitted engineers representing the State of California, purporting to act under the authority of the California Dam Supervision Law (Deering's General Laws of California, 1937, Act 1950, Statutes of California, 1929, p. 1505; amended by Statutes of California, 1933, p. 2148), to exercise complete jurisdiction and authority over the work (R. 722-723). As a consequence, orderly procedure proved impossible. When the amount of excavation originally contemplated was shot down from the north canyon wall, the State Engineers instructed the respondent to remove additional excavation (R. 2322). By November 1, 1935, the petitioner, under instructions from the respondent, had shot down approximately 50,000 yards of excavation from the north canyon wall, which covered the northern portion of the dam on which the petitioner had scheduled its first pouring of concrete on November 1, 1935 (R. 460, 2322).

Furthermore, the original excavation plan provided for the rock to be removed on radial lines with fillets[1] (R. 371). Nevertheless the petitioner was at first directed by the respondent to remove the excavation on a step plan with the elimination of the fillets, which meant the saving of a certain amount of excavation (R. 745). After the petitioner had largely completed the excavation on the step plan, the State Engineer expressed disapproval. The petitioner was then required to return to areas already approved by the respondent and perform the excavation on radial lines (R. 371, 2390-

[1] A fillet was described by one of petitioner's engineers as a thickening of the dam where it joins the canyon walls, the purpose being to increase the bearing area against the canyon walls (R. 349).

94). After excavation had been approved in certain areas, the petitioner was required to re-excavate the same areas as many as four separate times before the excavation was approved by the State Engineer. This manner of removing excavation required a repetition of cautious drilling and shooting and of clean-up for inspection (R. 2530).

An additional complicating factor was the absence of any agreement, months after the work had started, between the State Engineer and the City Engineer as to whether the dam should act primarily as a gravity dam or an arch dam (R. 466). If it had been made to function as a gravity dam, it would have required much less excavation than if it was to function as an arch dam (R. 387).

By reason of the increase in the amount of the excavation and the delays caused by the manner in which the petitioner was required to remove the excavation, it was not until April 24, 1936 (R. 1636), that the petitioner was first permitted to pour concrete on the northern portion of the canyon at the bottom of the canyon, and within a few days thereafter the spring runoff of the river was in progress. Water was released from the lower outlet valves under great pressure in the area to be concreted, which interfered with the proper and economical progress of the work (R. 470, 577). Consequently, the first concrete work originally planned to be performed in a season free from water interference was performed at great additional expense and delay to the petitioner (R. 636, 582).

When the overrun in excavation and the consequent delay became apparent, the petitioner used every available means at its command to speed the work, but was delayed by a lack of agreement between the State and City Engineers as to the extent and design of the excava-

tion (R. 506-7; Ct. Ex. 20). The petitioner was finally required to excavate a total of approximately 84,000 cubic yards of excavation for the addition to the dam, or approximately 200% in excess of that indicated in the specifications (R. 710), the excavation being carried to an average depth of approximately 35 feet, or about twice the depth of the excavation for the original dam (R. 673). Because the additional excavation was ordered in small quantities, there was no time during the course of the excavation, after the job had been equipped to handle the amount of excavation originally contemplated, when it would have been efficient or practical to provide for additional excavation equipment (R. 338, 339). Thus, the excavation which was started on July 17, 1935 (R. 1635), and should have been completed by November 1, 1935, was not accepted by the respondent until July 25, 1936 (R. 1636) more than eight months later.

In addition to the delay caused by the manner in which the petitioner was required to perform the additional excavation for the dam foundation, it was delayed in starting grouting [2] operations, thus being prevented from completing the grouting simultaneously with the other items of the contract. Petitioner endeavored to prepare for and start grouting on the original

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[2] Grout is a mixture of cement and water about the consistency of light cream (R. 644). The specifications called for the contractor to grout the seams in the old dam and the contraction joints in the new dam. Grout is forced into the cracks and the contraction joints under pressure from 50 to 500 pounds per square inch (R. 642). To confine the grout to a given area it is necessary to install water stops to prevent the grout and water from leaking through the cracks on the outside of the dam (R. 643). Before grouting the old dam it was necessary to caulk the cracks and joints with steel wool (R. 644).

dam and on the portion of the new dam which had been cooled as early as July 1937. After the petitioner with the approval of the City Engineer had commenced the caulking of the dam preparatory to grouting, it was advised that the State Engineer had disapproved of the plan and that it would not be permitted to do the grouting until approximately three months after the remainder of the work had been completed (R. 696, 697). There is nothing in the specifications to indicate that the grouting of the existing dam could not have been performed at any proper time the petitioner might elect to do it. The grouting was finally commenced in December 1937 (R. 697), at which time practically all of the work, with the exception of a few minor items, had been completed. During the grouting period it was necessary to maintain camp facilities, the cook house, dormitories, and supervision chargeable only to the operation of grouting (R. 828, 829, 2532).

The delays caused by the manner in which the petitioner was required to remove the additional excavation and other delays caused by respondent increased the cost of performing the work by approximately $791,000, or about 23% of the contract price (R. 205). Repeated protests were made against the respondent's conduct both orally and in writing (R. 463-464-467, 475-480). On November 25, 1936, the petitioner served written notice that the delays had resulted in a material and substantial departure from the original contract, that it would complete the work only under protest and that it reserved the right to claim additional and further compensation because of the departure from the original contract (R. 475). No objection was made to the statements contained in this notice.

The District Court held the contract abrogated and petitioner entitled to recover the reasonable value of

the work performed, together with a reasonable profit (R. 81, 93). Evidence as to reasonable value and profit was taken before a Special Master. He reported that the work had been performed by petitioner economically, efficiently, and in a good workmanlike manner (R. 200), that the reasonable value of the work, together with a reasonable profit, amounted to $4,248,254.03 (R. 204), and that the balance due was $791,253.34 (R. 205). The District Court approved the report of the Special Master (R. 246) and entered judgment in favor of the petitioner.

The Circuit Court of Appeals reversed, holding that since the petitioner had completed the work, it could not treat the contract as abrogated by the respondent's acts and recover the reasonable value of the work done (R. 3057).

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred

1. In holding that petitioner could not treat the contract as having been abrogated and recover the reasonable value of the work;

2. In failing to hold that the petitioner could recover in *quantum meruit* by reason of the fact that circumstances unanticipated by the parties had radically increased the cost of the work to be performed under the contract;

3. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The Circuit Court of Appeals did not question the findings of fact of the District Court and the Special Master, and indeed it could not, since there was ample evidence to support them. Summarized most briefly,

the findings show that there were radical changes in the character and amount of work under the contract as well as unreasonable delays in its performance caused by respondent. Both the changes and the delays greatly increased the expense of performance. The contract which should have been performed in less than two years and would have resulted in a profit to the petitioner (R. 399) required three years to perform and resulted in a loss in the sum of $405,048.43 (R. 204-05).

The District Judge applied an elementary and just principle in the law of contracts, holding that the respondent had forfeited the right to force the terms of the contract upon the plaintiff. It said:

> "Circumstances unanticipated by the parties made radical changes in the character and amount of the work to be performed under the contract, greatly increasing the expense thereof. I think that the contract may be deemed abrogated and plaintiff should be permitted to recover on a quantum meruit basis." (R. 81, 35 F. Supp. at 436).

The Circuit Court of Appeals reversed with the astounding statement that the judgment of the District Court appeared "unsupported by reason or authority" (R. 3056). But the rebuke would be more appropriately applied to the opinion of the appellate court which confined itself to distinguishing, on erroneous grounds, the cases cited by the trial court and admitted by the Circuit Court of Appeals itself to represent "an enlightened development of the law of contracts" (R. 3060). For, in the words of a commentator upon the District Court's decision, "The result reached * * * is not unusual." Note (1941) 51 *Yale L. J.* 162, 163.

Clearly the right lay with the petitioner. The respondent had unreasonably caused a year's delay in

the performance of the work which radically and unreasonably increased the cost of performing the work. Under the circumstances the Court should not have proved astute to deny the petitioner all relief and to saddle it with three years' service to the respondent at the loss of nearly one-half a million dollars. Even on the Circuit Court of Appeals' own view of the decisions which it held inapplicable, it should not have foreclosed the petitioner from recovering in *quantum meruit* at least for the work performed in excess of that called for by the contract.

In these circumstances we believe we would be justified in asking the Court to review the decision below on writ of certiorari on the ground that the Circuit Court of Appeals had so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. There are, however, two additional cogent reasons why this Court should grant the petition for the writ.

1. The decision of the Circuit Court of Appeals is untenable and therefore probably in conflict with the law of the State of California. See *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 206. The decision below presents an important question of local law. Although it is true that the appellate courts of the State of California have not expressly ruled upon the issue, it must be assumed that the California rule conforms to the recognized and established principles of law governing the interpretation of public contracts, as expressed by the Supreme Court of the United States, the Circuit Court of Appeals for the Eighth Circuit, other courts and text writers. California courts not only consult but follow the sound decisions of such other courts, especially when supported by the reasoned comments of

eminent writers. That is exactly what the District Judge did in this very case.[3]

In numerous cases where the cost of performing the contract has been unreasonably increased and the contractor has completed the work, the courts have held the contractor may recover the reasonable value of all the work performed. See, *e.g.*, *Salt Lake City* v. *Smith*, 104 Fed. 457 (C. C. A. 8); *United States* v. *Stage Co.*, 199 U. S. 414; *Freund* v. *United States*, 260 U. S. 60; and *Hayden* v. *City of Astoria*, 74 Ore. 525, 145 Pac. 1072. See also 4 Elliott, *Contracts*, sec. 3697.

In *Salt Lake City* v. *Smith*, 104 Fed. 457, the cost of performing the contract was radically increased by requiring the contractor to perform an unreasonable amount of additional work of the same character as that provided for in the plans and specifications, and additional work not of the same type as that described in the specifications. The contractor did not rescind the contract, but completed the work. The court held that the contractor could recover the reasonable value of the work performed. In this connection the court said:

> "Upon this question the court below held upon the trial, and finally charged the jury, in effect, that the city had no right to require the contractors

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[3] In this connection it is at least interesting to note that Judge St. Sure, who made the decision in the District Court, began the practice of law in California in 1895 and, prior to his appointment to the United States District Court for the Northern District of California, served as Judge of the Superior Court of Alameda County, California, and Associate Justice of the District Court of Appeal, First District of California. On the other hand, the members of the Circuit Court of Appeals come from Idaho, Oregon and Washington, and prior to their appointments to the Court practiced law in those states.

> to perform large quantities of work, radically different in its character, nature, and cost from that originally contemplated by the parties when they made their contract, and that, if it had required such work, *the plaintiffs were entitled to recover its reasonable value.* This was the theory upon which the case was tried, and it was the true theory. It is just to the city, fair to the contractors, and it accords with reason and established law. * * * Material quantities of work required by such alteration, that are substantially variant in character and cost from that contemplated by the parties when they made their agreement, constitute new and different work, not governed by the agreement, *for which the contractors may recover its reasonable value.*" (104 Fed. at 465-66, italics supplied.)

In *United States* v. *Stage Co.*, 199 U. S. 414, the contractor entered into a contract with the United State Government for carrying mail in the City of New York. After the contract was entered into a new distribution station was established with the result that the contractor was required to purchase additional equipment and the cost of performing the contract was radically increased The contractor did not rescind the contract, but completed the work. This Court held that the contractor was entitled to additional compensation for the additional work performed.

In *Freund* v. *United States,* 260 U. S. 60, the contractors, after having entered into an agreement with the United States Government to carry the mails over a certain route, were given notice that a different and more expensive route had been substituted for the one designated in the contract. The contractors protested, but performed the services and accepted periodic payments until the work was completed. This Court held

that they were entitled to recover the reasonable value of all the work performed, together with a reasonable profit.

In *Hayden* v. *City of Astoria,* 74 Ore. 525, 145 Pac. 1072, the contractor, after performing a contract similar to the one before this Court, was permitted to recover the reasonable value of the entire work. In holding that the contractor was entitled to recover on a *quantum meruit* the court said:

> "It is the rule that in carrying out a contract, whether time is of the essence or not, the owner cannot delay or retard the contractor in the progress of the work or prevent performance thereof without liability; and, where the owner under the contract is bound to furnish materials or do any other thing required to be done by him pursuant to the contract, he must do that thing in such a way as not to retard the contractor; *and, if through the act or omission of the owner under such circumstances the work is delayed in such a way as to make performance impossible, the contractor can recover upon the quantum meruit*" (145 Pac. 1074, italics supplied.)

It will be noted that in each of the foregoing cases in which the cost of performing the work was unreasonably increased, the contractor failed to rescind the contract, completed all of the work, accepted the periodic payments provided for by the contract, and nevertheless was permitted to recover the reasonable value of all the work performed.

2. The decision of the Circuit Court of Appeals presents a question of importance in the administration and interpretation of public contracts. The present case has become a focal point of interest to those en-

gaged in contracting on similar public works of like magnitude. Throughout it has been conceded that the petitioner performed its contract with the respondent economically, efficiently, and in a good workmanlike manner, and that due to the fault and neglect of respondent the cost of performing the work was increased by the sum of approximately $791,000, the amount of the judgment in the District Court. The increase in cost amounts to approximately 23% of the contract price. It cannot be denied that the increase in cost is radical, material, and substantial. The effect of the decision of the lower court in the present case must be considered by contractors in submitting proposals for public work. They will be required to consider the possibility that work may be delayed by a governmental body without limit and that the cost of performing the work may be radically increased without the possibility of recovering adequate or any compensation. If contractors have no assurance that they may receive adequate compensation when such contracts are performed economically and efficiently, then it would seem clear that competitive bidding for the construction of public works will no longer be predicated on estimated costs but will necessarily have to include the risk factors unjustifiably introduced by this decision. The result will of course be reflected in exorbitant proposals for the construction of public works. As noted by a commentator on this very case, the result here reached would "lead to a collective increase in the amount of bids by all bidders in which case the municipality would be charged excessively for those projects in which unforeseen difficulties fail to materialize." (1941) 51 *Yale L. J.* 162 at 163-64. For that reason it is important that this Court review and reverse the untenable decision of the Circuit Court of Appeals.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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